

Below is an Opinion of the Court.


RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	
)	Bankruptcy Case
JOEL ROBERT KNOWLING,)	No. 09-40551-rld7
_____)	
PETER C. McKITTRICK, Trustee,)	
)	
Plaintiff,)	Adv. Proceeding
)	No. 10-03148-rld
v.)	
)	
MICHAEL BROWN, RON STEVENS,)	MEMORANDUM OPINION
VISION PLASTICS, INC., TERRY GLENN)	
AND LYN GLENN,)	
)	
Defendants.)	
_____)	

On March 14, 2011, I heard argument at the hearing ("Hearing") on plaintiff Peter C. McKittrick, trustee's ("Trustee") and defendants Ron Stevens' ("Stevens") and Vision Plastics, Inc.'s ("Vision Plastics") cross-motions for summary judgment in this adversary proceeding. Stevens and Vision Plastics are referred to collectively herein as "Defendants."

Following the Hearing, I have considered carefully the pleadings, memoranda of arguments, stipulated facts and declarations

1 submitted by the parties, in light of the arguments presented, and
2 applicable legal authorities. Based on my consideration of the record
3 before me, I conclude that the Trustee is entitled to summary judgment in
4 his favor, and the cross-motion for summary judgment filed by Stevens and
5 Vision Plastics will be denied. My reasons follow.

6 This Memorandum Opinion sets forth my conclusions of law under
7 Federal Rule of Civil Procedure 52(a), applicable in this adversary
8 proceeding under Federal Rule of Bankruptcy Procedure 7052.¹ The parties
9 have stipulated that I have jurisdiction to decide this adversary
10 proceeding under 28 U.S.C. §§ 1334 and 157(b)(2)(E), (K) and (O), United
11 States District Court Local Rule 2100.1, and Rule 7001.

12 13 Stipulated Facts

14 The following background facts are taken primarily from the
15 Stipulated Concise Statement of Material Facts ("Stipulated Facts") filed
16 by the parties. Factual statements set forth in declarations submitted
17 independently by the Trustee or the Defendants are noted as such.

18 On December 18, 2009, Joel Robert Knowling ("Debtor") filed a
19 bankruptcy petition for relief under chapter 7. The Trustee was
20 appointed as the trustee in Debtor's bankruptcy case.

21 Vision Plastics is an Oregon corporation, and Stevens owns 100%
22 of its outstanding stock.

23 Prior to the Petition Date, Debtor operated a business in
24

25 ¹ Unless otherwise specified, all chapter and section references are
26 to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references
are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 Portland, Oregon under the assumed business name of Columbia River Lift
2 Equipment ("Business"). The Business engaged in the purchase and sale of
3 commercial lifts and other equipment (collectively, "Equipment").

4 Prior to the Petition Date, Debtor was a member of the Columbia
5 River Yacht Club ("CRYC"). Stevens also was a member of CRYC. Debtor's
6 wife at that time, Tracy Knowling ("Ms. Knowling"), was never a member of
7 CRYC.

8 On or about June 1, 2009, the Debtor and Stevens entered into
9 an agreement pursuant to which Stevens loaned the Debtor \$225,000 (the
10 "Loan"), and Debtor signed and delivered to Stevens a document entitled
11 "Promissory Note - Personal Guaranty for repayment of business
12 investment" ("Promissory Note"). Under the Promissory Note, the Debtor
13 was to repay the Loan plus a return of an additional \$16,500 on or before
14 July 15, 2009. The Promissory Note was prepared by the Debtor, and
15 neither the Debtor nor Stevens was represented by counsel with respect to
16 the Promissory Note transaction. Declaration of Ronald E. Stevens
17 ("Stevens Declaration"), Paragraph 2, at p. 2.

18 The Promissory Note listed the following as collateral for the
19 Loan: (a) 2,835 square feet of water use rights, slip D-16, at CRYC
20 ("Water Rights"); (b) four 2005 S-125 Genie Boom Lifts, serial numbers
21 716, 829, 837 and 912 (collectively, "Boom Lifts"); and (c) one 35' x 81'
22 Christiansen Boathouse ("Boathouse") (collectively, the "Initial
23 Collateral"). Stevens did not take any immediate steps to perfect his
24 security interest in any items of the Initial Collateral. Stevens
25 further never was listed as a security interest holder on the Boathouse
26 title, and at the time the Promissory Note was signed, the Boathouse was

1 owned by the Debtor and Ms. Knowling as joint tenants with rights of
2 survivorship. Prior to making the Loan, the Debtor represented to
3 Stevens that he owned the Boathouse, and it was titled in the Debtor's
4 name only. Stevens Declaration, Paragraph 3, at p. 2.

5 The Debtor failed to repay the Loan on July 15, 2009 and
6 thereafter was in default of his payment obligations to Stevens under the
7 Promissory Note.

8 In September 2009, Stevens learned that, contrary to the
9 Debtor's express representations to him, Ms. Knowling had an ownership
10 interest in the Boathouse. "Debtor lied to me [Stevens], and I was not
11 pleased by his prior fraudulent representation." Stevens Declaration,
12 Paragraph 7, at p. 3.

13 On or about September 23, 2009, Stevens assigned his interest
14 in the Promissory Note to Vision Plastics. On September 23, 2009, the
15 Debtor and Vision Plastics agreed that Debtor would grant Vision Plastics
16 a first position security interest in all Equipment and in all other
17 assets of the Business ("Business Assets"), and Debtor would sign an
18 assignment of lease ("Assignment of Lease") and a bill of sale ("Bill of
19 Sale") with respect to the Water Rights to Vision Plastics "[b]ecause the
20 Debtor was not able to grant a security interest in a boathouse described
21 in the Promissory Note." Security Agreement, Recital B, at p. 1.
22 Counsel for Vision Plastics prepared a Security Agreement ("Security
23 Agreement") in September 2009 that was signed by the Debtor and Vision
24 Plastics, respectively, on September 23, 2009, and September 25, 2009.
25 The Security Agreement did not include any provision for a release of any
26 of Defendants' claims, including fraud claims, against the Debtor.

1 As part of and in conjunction with the signing of the Security
2 Agreement by the parties, the Debtor signed the Assignment of Lease and
3 the Bill of Sale. Under the Bill of Sale, the Debtor purported to
4 transfer the Water Rights, now described as at slip location D-15, to
5 Stevens. Vision Plastics, as a corporation, was not authorized to own
6 the Water Rights under the CRYC rules.

7 The transfers contemplated and effected through the Security
8 Agreement were intended by Vision Plastics to be a contemporaneous
9 exchange for new value given to the Debtor.

10 After obtaining the Bill of Sale, Stevens requested the CRYC to
11 approve the transfer of the Water Rights into his name, but the transfer
12 of the Water Rights never was formally approved by the CRYC.

13 On October 8, 2009, Vision Plastics filed a UCC-1 financing
14 statement with the Oregon Secretary of State reflecting a security
15 interest in the Boom Lifts and other Equipment, the Business Assets and
16 the Water Rights.

17 At the time of the transfers of interests in the Equipment,
18 Business Assets and Water Rights to Vision Plastics, the Debtor owed
19 Vision Plastics in excess of \$241,000 and was in default of the Promissory
20 Note obligations for having failed to make any payments to Vision
21 Plastics and/or Stevens on the Loan.

22 On June 1, 2009, the Debtor was the sole owner of the Water
23 Rights, as listed in the CRYC records. Ms. Knowling asserts an interest
24 as co-owner of the Water Rights dating back to March 2009. Vision
25 Plastics disputes that Ms. Knowling has any ownership interest in the
26 Water Rights.

1 On February 25, 2010, the Trustee conducted an auction of the
2 Equipment and Business Assets. Vision Plastics claims a secured interest
3 in the auction proceeds. Gross proceeds from the sale of the Equipment
4 and Business Assets were \$94,657.

5 In May 2010, the Trustee sold the Boathouse and Water Rights
6 free and clear of liens to a third party. Vision Plastics claims an
7 interest in the Water Rights proceeds as a secured creditor or owner
8 under the Bill of Sale. The Trustee and Vision Plastics have agreed that
9 \$77,500 of the Boathouse and Water Rights proceeds are allocable to the
10 Water Rights.

11 For "preference" purposes under § 547, the date 90 days in
12 advance of the Debtor's bankruptcy filing was September 19, 2009.

13 14 Discussion

15 A. Summary Judgment Standards

16 Under Civil Rule 56(c), applicable under Rule 7056, summary
17 judgment is appropriately entered only when "the pleadings, the discovery
18 and disclosure materials on file, and any affidavits show that there is
19 no genuine issue as to any material fact and that the movant is entitled
20 to judgment as a matter of law." Summary judgment is inappropriate when
21 there are disputes over facts that may affect the outcome of the
22 litigation under governing law. Anderson v. Liberty Lobby, Inc., 477
23 U.S. 242, 249 (1986). An issue of fact is genuine and material if the
24 evidence is such that the fact finder could decide the case in favor of
25 the nonmoving party. Id. All justifiable inferences from the evidence
26 presented must be considered in favor of the nonmoving party. Id. at

1 255.

2 The moving party initially bears the burden of showing that
3 there are no genuine issues of material fact. Bhan v. NME Hospitals,
4 Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the moving party meets
5 this burden, the opposing party must produce sufficient evidence beyond
6 the pleadings, through affidavits and/or other admissible evidence, to
7 demonstrate that material fact disputes in fact exist. Id.

8 B. Basic Preference Law

9 Section 547(b) authorizes the trustee to avoid certain
10 transfers made to or for the benefit of creditors during the period
11 shortly before a debtor's bankruptcy filing. O'Rourke v. Coral Constr.
12 (In re E.R. Fegert, Inc.), 88 B.R. 258, 259 (9th Cir. BAP 1988); Valley
13 Bank v. Vance (In re Vance), 721 F.2d 259, 260 (9th Cir. 1983). For
14 preference purposes, the term "transfer" includes both "voluntary and
15 involuntary" transfers of an interest in property of the debtor by "the
16 creation of a lien" or "the retention of title as a security interest."
17 See Western States Glass Corp. v. Harris (In re Bay Area Glass), ____ B.R.
18 ____ (9th Cir. BAP June 28, 2011); § 101(54)(A) and (B). Congress
19 intended that the term "transfer" be interpreted broadly to include,
20 among other things, the grant of a consensual lien or security interest.
21 See 2 Collier on Bankruptcy ¶ 101.54, at pp. 101-214-15 (Alan N. Resnick
22 and Henry J. Sommer, eds., 16th ed. 2011).

23 Section 547(b) provides in relevant part that:

24 [T]he trustee may avoid any transfer of an interest of
25 the debtor in property-
26 (1) to or for the benefit of a creditor;
 (2) for or on account of an antecedent debt owed by
 the debtor before such transfer was made;

1 (3) made while the debtor was insolvent;
2 (4) made-on or within 90 days before the date of
 filing of the [bankruptcy] petition;
3 (5) that enables such creditor to receive more than
 such creditor would receive if-
4 (A) the case were a case under chapter 7 of this
 title;
5 (B) the transfer had not been made; and
6 (C) such creditor received payment of such debt to the
 extent provided by the provisions of this title.

7 There is no dispute among the parties that the subject
8 transfers to Vision Plastics and Stevens were for the benefit of the
9 Defendants as creditors, and the subject transfers were on account of an
10 antecedent debt, the unpaid Loan. Accordingly, the first two elements
11 for a preferential transfer under § 547(b) are satisfied.

12 Under § 547(f), Debtor is "presumed to have been insolvent on
13 and during the 90 days immediately preceding the date of the filing of
14 the [Debtor's bankruptcy] petition." Defendants have submitted no
15 evidence to rebut that presumption. Accordingly, the third preference
16 element under § 547(b) is satisfied.

17 Although the parties raise some arguments as to whether
18 September 23, 2009 (the date the Security Agreement, Assignment of Lease
19 and Bill of Sale were executed by the Debtor) or October 8, 2009 (the
20 date that Vision Plastics filed its UCC-1 financing statement with the
21 Oregon Secretary of State) is the relevant date for preference analysis,
22 both dates fall within the 90-day preference period in advance of the
23 Debtor's bankruptcy filing. In these circumstances, whatever date
24 applies to the transfers falls within the 90 day preference period of
25 § 547(b)(4)(A), and the fourth preference element is satisfied.

26 Finally, although Defendants argue otherwise, the fact is if I

1 do not avoid the subject transfers as preferential, Vision Plastics
2 arguably will be entitled to all of the proceeds from the sale of the
3 Equipment and Business Assets and the entire \$77,500 of proceeds
4 allocable to the Water Rights as having a first priority security
5 interest in those proceeds, while if I find that the transfers are
6 avoidable as preferences, Vision Plastics will only share pro rata with
7 other general unsecured creditors in distributions from said proceeds.
8 Accordingly, if the transfers are allowed to stand, Vision Plastics will
9 receive more than it would have if the transfers had not been made. The
10 fifth element under § 547(b) is satisfied.

11 Based on the record presented in this adversary proceeding, I
12 find that the Trustee has met his burden of proof to establish that the
13 transfers at issue are preferential for purposes of § 547(b).

14 C. Contemporaneous Exchange for New Value

15 Defendants' primary defense to the Trustee's motion for summary
16 judgment and the basis for their own motion for summary judgment is their
17 argument that the transfers provided for in the Security Agreement
18 support a preference defense under § 547(c)(1). Section 547(c)(1)
19 provides that:

20 The trustee may not avoid under [§ 547] a transfer-
21 (1) to the extent that such transfer was -
22 (A) intended by the debtor and the creditor to or for
23 whose benefit such transfer was made to be a
24 contemporaneous exchange for new value given to the
debtor; and
(B) in fact a substantially contemporaneous exchange;
. . . .

25 In the Stipulated Facts, the parties agree that the transfers in issue
26 were intended by Vision Plastics to be a contemporaneous exchange for new

1 value given to the Debtor. In an interrogatory response, the Debtor
2 states that, "It is my understanding that [Vision Plastics] and/or
3 Stevens agreed to accept a security interest in the [Equipment and
4 Business Assets] in lieu of a security interest in the Boathouse, and it
5 all happened simultaneously on or about September 23, 2009." He further
6 states that, "In my terms 'in lieu of' means the same as 'in exchange
7 for,'" a carefully crafted statement notable for its studied ambiguity.
8 Defendant's Supplemental Limited Response By Stipulation To Plaintiff's
9 First Set Of Interrogatories ("Defendant's Supplemental Response"),
10 Response to Interrogatory No. 17, attached to the Declaration of
11 Jeffrey C. Bodie. See Defendant's Supplemental Response, Response to
12 Interrogatory No. 18. Accordingly, I conclude that the first element of
13 the "new value" defense is satisfied.

14 The problem for Defendants is with the second element, whether
15 in fact there was a substantially contemporaneous exchange of value.
16 Under § 547(a)(2), "'new value' means money or money's worth in goods,
17 services, or new credit, or release by a transferee of property
18 previously transferred to such transferee in a transaction that is
19 neither void nor voidable by the debtor or the trustee under any
20 applicable law, including proceeds of such property, but does not include
21 an obligation substituted for an existing obligation."

22 Defendants argue that the value exchanged on September 23,
23 2009, was Vision Plastics' release of its security interest in the
24 Boathouse "then worth between \$220,500 and \$245,000," in exchange for
25 security interests in the Equipment and Business Assets and the Bill of
26 Sale to the Water Rights, that were collectively worth less than the

1 value of the Boathouse.

2 I find that argument fundamentally problematic because it is
3 inconsistent with express terms of the Security Agreement. Returning to
4 the original Promissory Note transaction between the Debtor and Stevens,
5 by its terms, the Promissory Note, as drafted by the Debtor, reflects an
6 intent to grant a security interest in the Boathouse to Stevens. In his
7 declaration, Stevens states that prior to his making the Loan and in
8 response to a question from Stevens, Debtor represented that the
9 Boathouse "was owned and titled in his name only." Stevens Declaration,
10 Paragraph 3, at p. 2. Following the execution of the Promissory Note,
11 Stevens never took any steps to perfect his security interest in the
12 Boathouse by having his name noted on its title.

13 Thereafter, in September 2009, Stevens learned that in reality,
14 Debtor was not the sole owner of the Boathouse, and in fact, Ms. Knowling
15 had an ownership interest in the Boathouse. Stevens Declaration,
16 Paragraph 7, at p. 3. As Stevens asserted, "Debtor lied to me, and I
17 was not pleased by his prior fraudulent representation." Id.

18 With the Loan in default, the Debtor not having paid Stevens a
19 dime on the outstanding Promissory Note obligation, Stevens took steps to
20 protect his position. Taking no chances on the Debtor's further drafting
21 efforts, Stevens retained attorney Mark Eves to prepare the Security
22 Agreement, the Assignment of Lease and the Bill of Sale to document
23 further transactions with the Debtor accurately and properly. After
24 Stevens' assignment of the Promissory Note to Vision Plastics, Vision
25 Plastics, Stevens and the Debtor signed the Security Agreement on or
26 about September 23, 2009.

1 After acknowledging the transactions reflected in the
2 Promissory Note and Stevens' assignment of the Promissory Note to Vision
3 Plastics, Recital B in the Security Agreement states the following:

4 The above financial accommodations were provided by
5 the Secured party in reliance upon representations
6 made by the Debtor that the Debtor would execute and
7 deliver to the Secured party this Security Agreement,
8 together with other documents creating collateral and
9 security for the above financial and other
accommodations. Because the Debtor was not able to
grant a security interest in a boathouse described in
the Promissory Note, the Debtor and Secured Party
agreed to accept a first position security interest in
the assets described below. (Emphasis added.)

10 Paragraph 15 of the Security Agreement further provides, in relevant
11 part: "This Agreement shall not be qualified or supplemented by course of
12 dealing."

13 In other words, the Defendants and the Debtor expressly
14 recognized in the Security Agreement that whatever intent as to the
15 creation of security interests in favor of Stevens in the Initial
16 Collateral was reflected in the Promissory Note, any security interest in
17 the Boathouse was ineffective or illusory "[b]ecause the Debtor was not
18 able to grant a security interest in" the Boathouse.²

19
20 ² The security arrangements in the Promissory Note may not have been
21 illusory only as to the Boathouse: In Defendants' Memorandum of Law in
22 Support of Motion for Summary Judgment ("Defendants' SJ Memorandum"),
Defendants state that the Debtor never acquired the Boom Lifts.
Defendants' SJ Memorandum, at p. 6.

23 As to the Water Rights, Debtor appears to have been "slippery" in
24 his identification of the docking slip to which the Water Rights related.
25 In the Promissory Note, the Water Rights are identified as "currently
26 located @ slip D-16." Yet in the Security Agreement, the Bill of Sale
and the UCC-1 financing statement filed by Vision Plastics with the
Oregon Secretary of State, the Water Rights are identified as "at slip
location D-15."

(continued...)

1 Since Defendants acknowledged in the Security Agreement that no
2 effective security interest in the Boathouse was provided in the
3 Promissory Note, their argument that value can be provided for
4 § 547(c)(1) purposes by the release of an unperfected security interest
5 is unavailing. See, e.g., Sulmeyer v. Suzuki (In re Grand Chevrolet,
6 Inc.), 25 F.3d 728 (9th Cir. 1994); Milchem, Inc. v. Fredman (In re
7 Nucorp Energy, Inc.), 902 F.2d 729 (9th Cir. 1990).

8 Even if I credit the statement in the Stipulated Facts that the
9 Defendants and Debtor agreed on September 23, 2009 that the grant to
10 Vision Plastics of a first priority security interest in the Equipment
11 and Business Assets and the transfer of the Water Rights in the Bill of
12 Sale were made "in exchange for a release of Creditor's security interest
13 in the Boathouse," such release of an unperfected security interest in
14 the Boathouse does not meet the test for "value" established by the Ninth
15 Circuit in Nucorp and Grand Chevrolet:

16 In In re Nucorp Energy, 902 F.2d 729, 733 (9th Cir.
17 1990), we held that "a court must measure the value
18 given to the creditor and the new value given to the
19 debtor in determining the extent to which the trustee
20 may void a contemporaneous exchange." See also In re
21 Spada, 903 F.2d 971, 977 (3d Cir. 1990) (holding that
22 party seeking shelter of § 547(c)(1) must "prove the
specific measure of the new value given to the debtor
in the exchange"); In re Arrow Air, 940 F.2d 1463
(11th Cir. 1991). Value should be measured at the
time of the transfer. In re Nucorp Energy, 902 F.2d
at 733; In re Robinson Bros. Drilling, 877 F.2d at 33.
(Emphasis added.)

23 In re Grand Chevrolet, Inc., 25 F.3d at 733.

24
25 ²(...continued)

26 Apparently, whatever Stevens intended with respect to the Initial
Collateral in the Promissory Note, as drafted, the Debtor gave him "the
sleeves off his vest."

1 The record presents clear evidence as to the value placed by
2 the Defendants and the Debtor on the unperfected security interest in the
3 Boathouse as of the date of the Security Agreement: Since Recital B
4 states unequivocally a recognition by the parties that "the Debtor was
5 not able to grant a security interest in" the Boathouse, I find that the
6 ineffective attempt in the Promissory Note to grant a security interest
7 in the Boathouse had no value at the time of the transfers on or about
8 September 23, 2009.

9 Defendants assert two other sources of "new value" given to
10 the Debtor at the time the subject transfers were made: 1) a brief
11 extension of time to repay the Loan; and 2) avoidance of a fraud claim
12 regarding the Debtor's misrepresentations to Stevens as to the status of
13 title to the Boathouse prior to Stevens making the Loan. Defendants' SJ
14 Memorandum, at pp. 7-8.

15 The Security Agreement does not mention any forbearance on
16 collecting the Loan. A number of courts have held that the provision of
17 § 547(a)(2) specifically excluding from the "new value" definition "an
18 obligation substituted for an existing obligation," excludes a creditor's
19 forbearance from taking collection action against the debtor from
20 consideration as "new value" as a matter of law. See, e.g., American
21 Bank of Marin County v. Leasing Serv. Corp. (In re Air Conditioning, Inc.
22 Of Stuart), 845 F.2d 293, 298 (11th Cir. 1988), cert. denied, 488 U.S.
23 993 (1988); Alithochrome Corp. v. East Coast Finishing Sales Corp. (In re
24 Alithochrome Corp.), 53 B.R. 906, 914 (Bankr. S.D.N.Y. 1985). In any
25 event, there is no evidence in the record that would allow me to make a
26 determination as to the value of "a brief extension of time to repay the

1 Loan" of unspecified duration. See, e.g., Schlant v. Schueler (Inre
2 Buffalo Auto Glass), 187 B.R. 451, 455 ((Bankr. W.D.N.Y. 1995) ("[E]ven
3 though this Court believes that forbearance may provide new value, the
4 actual value of said new value is for the Defendant, not the Trustee, to
5 establish, and may be too speculative to be meaningful."). I find
6 Defendants' assertion of new value from an indeterminate forbearance from
7 taking collection action against the Debtor too speculative to be
8 meaningful in this case.

9 As for Defendants' assertion that the subject transfers allowed
10 the Debtor to avoid a fraud claim, as noted above, the Security Agreement
11 does not include any provision for a release of claims, fraud or
12 otherwise, by Defendants against the Debtor. Further, as pointed out by
13 the Trustee in his Response to Defendants' Motion for Summary Judgment,
14 following the Debtor's bankruptcy filing, the Defendants filed an
15 adversary proceeding, No. 10-03080-rld, seeking to except their claims
16 against the Debtor from discharge under § 523(a)(2)(A) based on the
17 Debtor's alleged fraud and misrepresentations in inducing Stevens to make
18 the Loan. In other words, whatever short-term reprieve the transfers
19 provided for in the Security Agreement gave to the Debtor from fraud
20 claims, they were not released and indeed, were prosecuted postpetition
21 by the Defendants. I find that no new value was provided by the asserted
22 "avoidance" of fraud claims.

23 Ultimately, I conclude that the transfers reflected in the
24 Security Agreement, Assignment of Lease and Bill of Sale, and the
25 subsequent filing by Vision Plastics of its UCC-1 financing statement
26 with the Oregon Secretary of State were driven by the Defendants'

1 recognition that they were at risk with respect to the defaulted Loan
2 obligation, an antecedent debt, and they needed to take steps to shore up
3 their security position for purposes of collection. The original attempt
4 to establish a secured position with respect to the Boathouse was
5 recognized as ineffective by the Defendants in the Security Agreement,
6 drafted to protect them by Defendants' own counsel. I previously have
7 concluded that the Trustee has met his burden of proof to establish that
8 the subject transfers were avoidable preferences under all of the
9 required elements of § 547(b). I further conclude that Defendants have
10 not met their burden to establish a contemporaneous exchange defense
11 under § 547(c)(1). They have not presented a genuine issue of material
12 fact that would preclude entry of summary judgment in favor of the
13 Trustee.

14 15 Conclusion

16 Based on the foregoing conclusions of law, in light of the
17 record presented by the parties, I conclude that the Trustee's motion for
18 summary judgment should be granted, and the Defendants' cross-motion for
19 summary judgment should be denied. Counsel for the Trustee should submit
20 an appropriate form of order and judgment, consistent with this
21 Memorandum Opinion, within ten days following its entry.

22 ###

23 cc: Christopher L. Parnell
24 Gregory J. Dennis
25 Jeffrey C. Bodie
26 Craig G. Russillo
Heather E. Harriman